



September 30, 2016

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Via foiaonline.regulations.gov

Re: Freedom of Information Act request

Dear FOIA Officer:

I write on behalf of the Competitive Enterprise Institute (“CEI”), a non-profit public policy organization operated under section 501(c)(3) of the tax code.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, CEI requests certain documents related to the investigation and civil proceedings arising from the unlawful use of defeat devices in certain diesel vehicles (“Diesel Controversy”) marketed by Volkswagen AG, Audi AG, Volkswagen Group of America, Inc., and Volkswagen Group of America Chattanooga Operations, LLC (collectively, “Volkswagen”). The requested Diesel Controversy documents preceded three agreements with Volkswagen, which were submitted for court approval on June 28, 2016 before the Northern District of California, MDL No. 2672 (“MDL”), by the U.S. Department of Justice as a Partial Consent Decree (“DOJ Consent Decree”), by the U.S. Federal Trade Commission as a Proposed Order (“FTC Order”), and by a steering committee of private attorneys (“MDL Plaintiffs’ Counsel”) as a Consumer Class Action Settlement Agreement and Release (“Class Action Settlement”).

Specifically, I request:

1. Draft consent decrees, stipulations, memorandums of understanding, or settlement agreements concerning the Diesel Controversy—including drafts of the DOJ Consent Decree, FTC Order, and Class Action Settlement—along with any correspondence attaching such drafts, which were sent to or from Volkswagen’s representatives.¹

¹ I request all such correspondence in any form, but to assist with email collection, Volkswagen representatives include individuals having email address with the following domain names: @vw.com, @sullcrom.com, @jonesday.com, and @kirkland.com.

2. Emails or other communication concerning the Diesel Controversy addressed to, from, or copying any MDL Plaintiffs' Counsel.²
3. Documents mentioning Plaintiffs' Counsel in connection with the DOJ Consent Decree, the FTC Order, or any government investigation into the Diesel Controversy.

All responsive records will have been sent or created between September 18, 2015 and June 28, 2016, inclusive.

We request responsive records in electronic format. Please provide the requested records in electronic form, unless it would be cheaper to obtain paper copies. That said, please search for responsive records regardless of format, medium, or physical characteristics.

We request a rolling production, with responsive records being processed and produced independent of any others, as no such production is dependent upon other records being released. If your office contends that any portion of the requested records are exempt from disclosure, CEI requests a timely index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

We do not seek duplicates of responsive records. Nor do we seek documents publicly available online, such as documents on <https://www.epa.gov/vw> and <https://www.vwcourtsettlement.com/>. Publicly-available documents are excluded from this FOIA request, even if they would otherwise fall into the three categories of records requested above.

If you have information to help narrow this request, please contact the undersigned.

Fee Waiver Request

We request that your office waive charges pursuant to 5 U.S.C. § 552(a)(4)(iii) & 6 C.F.R. Part 5, Subpart A. Disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requestor.

² MDL Plaintiffs' Counsel includes attorneys Benjamin L. Bailey, Steve W. Berman, David Boies, Elizabeth J. Cabraser, David Seabold Casey, Jr., James E. Cecchi, Roxanne Barton Conlin, Jayne Conroy, Paul J. Geller, Robin L. Greenwald, Michael D. Hausfeld, Michael Everett Heygood, Adam J. Levitt, W. Daniel "Dee" Miles III, Frank Mario Pitre, Joseph F. Rice, Rosemary M. Rivas, Lynn Lincoln Sarko, Christopher A. Seeger, J. Gerard Stranch IV, Roland K. Tellis, Lesley Elizabeth Weaver, and all other attorneys, paralegals, and investigators working with these attorneys. CEI believes that many emails to, from, or copying Plaintiffs' Counsel will include at least one of the following domain names: @baileyglasser.com, @hbsslaw.com, @bsfllp.com, @lchb.com, @cglaw.com, @carellabyrne.com, @simmonsfirm.com, @rgrdlaw.com, @weitzlux.com, @hausfeldllp.com, @hop-law.com, @gelaw.com, @BeasleyAllen.com, @cpmlegal.com, @motleyrice.com, @finkelsteinthompson.com, @kellerrohrback.com, @seegerweiss.com, @bsjfirm.com, @baronbudd.com, or @blockesq.com.

Your agency has previously granted CEI a fee waiver for its FOIA requests.³

CEI is a nonprofit, tax-exempt, public-interest organization, with formal research, educational, and publication functions as part of its mission. Release of these records will serve the public interest by contributing significantly to the public's understanding of government operations, the shaping of public policy, and how taxpayer money is spent. CEI intends to disseminate the information at issue in this request to the general public; CEI has already researched, published, commented, and testified about the DOJ Consent Decree.⁴ Additionally, government communication with Plaintiffs' Counsel is of particular interest to CEI and its Center for Class Action Fairness, which represents an objector to the Class Action Settlement *pro bono*. CEI has commented on the terms of the Class Action Settlement, which appears to piggyback on the government agreements, but at a potential cost to the class of \$332 million.⁵

Disclosure is likely to contribute significantly to public understanding of government operations and related activities. Past CEI FOIA requests have publicized useful information that was of interest to the public and featured in news articles.⁶ CEI is regularly cited in newspapers and

³ See the attachment to this letter, an EPA letter granting CEI a waiver of fees under FOIA.

⁴ See William Yeateman, [*Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax, and Environmental and Natural Resources Division and the U.S. Trustee Program*](#), House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Laws, Sep. 29, 2016; Clyde Wayne Crews, Jr., [*Examining the Use of Agency Regulatory Guidance, Part II*](#), Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, Jun. 30, 2016; [*CEI Comments on Proposed Volkswagen Settlement with DOJ Under the Clean Air Act*](#), CEI Blog, Aug. 5, 2016; Emily Field, [*Emissions Funding In VW Deal Misses Problem, Groups Say*](#), Law360, Aug. 5, 2016.

⁵ See Chris White, [*Think Tank Claims Attorneys Bilked VW Claimants Out Of Hundreds Of Millions*](#), Daily Caller, Sep. 20, 2016; Amanda Bronstad, [*Objectors Fault \\$324 M in Potential Fees in VW Emissions Accord*](#), National Law Journal, Sep. 20, 2016; Patrick Ambrosio, [*Not Everyone is Happy with the \\$14.7 Billion Volkswagen Settlement*](#), Bloomberg BNA, Sep. 27, 2016.

⁶ See, e.g., Stephen Dinan, [*Do Text Messages from Feds Belong on Record? EPA's Chief's Case Opens Legal Battle*](#), Washington Times, Apr. 30, 2011, at A1 (news coverage based on records obtained by CEI's Chris Horner); Kyle Smith, [*Hide & Sneak*](#), New York Post, Jan. 6, 2013, at 23 (crediting CEI's Horner for breaking the story); Anthony Watts, [*FOIA and the coming US Carbon Tax via the US Treasury*](#), Watts Up With That, Mar. 22, 2013 (two-time "science blog of the year"); Stephen Dinan, [*EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*](#), Washington Times, Apr. 9, 2013, at A4 (EPA stepped up records-management training based on "admission" that staff had "fallen short" on complying with EPA rules, a practice uncovered by CEI); Dinan, [*Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*](#), Washington Times, Apr. 2, 2013, at A1 (citing information from CEI's Horner); Trey Kovacs & Alex Habighorst, [*Time for an Official End to Federal Employee Union Subsidies*](#), Washington Examiner, June 5, 2013 (Op-ed by CEI staff citing documents obtained in CEI FOIA requests); Dawn Reeves, [*EPA Emails Reveal Push To End State Air Group's Contract Over Conflict*](#), Inside EPA, Aug. 14, 2013; Stephen Dinan, [*EPA's use of secret email addresses was widespread: report*](#), Washington Times, Feb. 13, 2014.

trade publications for their open records efforts.⁷ CEI has the ability to disseminate the requested information to the general public, and thus produce a better-informed public, since its publications and blogs are widely cited in media publications. CEI is not only the source of information, but it applies substantive editorial control over its own publications.

CEI thus also qualifies as a media outlet under the Freedom of Information Act. Due to its routine dissemination of information to the public, CEI qualifies as a “representative of the news media” pursuant to FOIA.⁸ CEI publishes its findings in print and electronic media, as well as newsletters to legislators, education professionals, and other interested parties. CEI’s web sites and blogs receive approximately 80,000 monthly visitors (approximately 40,000 unique) and publishes new content very weekday.⁹ All of these activities fulfill CEI’s public interest mission, and these publications independently qualify CEI for a fee waiver as a “representative of the news media” under FOIA.

If our fee waiver is denied, we request in the alternative that your office waive charges for the first 100 pages and first two hours of search time. We are willing to pay up to \$100.00, and in the event of any appeal as appropriate, we request the search and document production proceed in the interim. If there are any such charges, please provide an invoice for the time incurred and cost for each document for which more than \$25.00 is sought.

⁷ See, e.g., Christopher C. Horner, [EPA administrators invent excuses to avoid transparency](#), Washington Examiner, Nov. 25, 2012; Christopher C. Horner, [EPA Circles Wagons in ‘Richard Windsor’ Email Scandal](#), Breitbart, Jan. 16, 2013; Christopher C. Horner, [DOJ to release secret emails](#), Breitbart, Jan. 16, 2013; Anthony Watts, [NOAA releases tranche of FOIA documents -- 2 years later](#), Watts Up With That (two-time “science blog of the year”), Aug. 21, 2012; [The roadmap less traveled](#), Watts Up With That, Dec. 18, 2012; [Today is D-Day -- Delivery Day -- for Richard Windsor Emails](#), Watts Up With That, Jan. 14, 2013; [EPA Doubles Down on ‘Richard Windsor’ Stonewall](#), Watts Up With That, Jan. 15, 2013; [Treasury evasions on carbon tax email mock Obama's 'most transparent administration ever' claim](#), Washington Examiner, Oct. 25, 2013; [Nothing to See Here! Shredding Parties and Hiding the Decline in Taxpayer-Funded Science](#), Watts Up With That, Feb. 17, 2014; [Editorial: Obama's chief science adviser must explain secret emails](#), Washington Examiner, May 5, 2014; Fred Lucas, [White House Official Accused of Trying to Hide Communications](#), The Blaze, May 6, 2014; Hans Bader, [CEI Sues White House Science Office for Hiding Secret, Non-Work Email Accounts](#), Global Warming.Org, May 5, 2014.

⁸ See *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (“It is critical that the phrase ‘representative of the news media’ be interpreted broadly if the act is to work as expected. . . . In fact any person or organization which regularly published or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’”); see also *EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (publisher of bi-weekly electronic newsletter qualified as media); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173 (10th Cir. 2005) (fee waiver for group that “aims to place the information on the Internet”; “Congress intended the courts to liberally construe the fee waiver” provisions); *Cause of Action v. FTC*, 799 F.3d 1108, 1115 (D.C. Cir. 2015) (agency could not rely on its fee-waiver regulations to reject fee waiver authorized by the FOIA statute itself).

⁹ See, e.g., CEI Blog (formerly OpenMarket Blog), <https://cei.org/blog> (one of several blogs operated by CEI providing daily coverage of legal and regulatory issues); www.globalwarming.org (another CEI blog).

Per 5 U.S.C. § 552(a)(6)(A)(i), I look forward to hearing from you within 20 working days. If any part of this request is denied, please provide a written explanation for the denial including a reference to the specific statutory exemption on which you are relying, and provide the name and address of the person or body to whom an appeal should be directed. Also, please provide all segregable or non-exempt portions of otherwise exempt material.

Please do not hesitate to contact me if you have any questions or if you foresee problems in fully releasing the requested records.

Best regards,



M. Frank Bednarz
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Competitive Enterprise Institute
1301 L Street, NW, 7th Floor
Washington, DC 20005
frank.bednarz@cei.org
202-448-8742

ATTACHMENT

Grant of Fee Waiver to CEI, May 10, 2010,
By U.S. Environmental Protection Agency



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

May 10, 2010

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. Hans Bader
Competitive Enterprise Institute
1899 L Street, NW, 12th Floor
Washington, DC 20036

RE: Request Number HQ-FOI-01223-10

Dear Mr. Bader:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA), 5 U.S.C. 552 request. Your FOIA request is seeking a copy of records referred to as the Kerry-Graham-Lieberman climate bill and any attachments or exhibits.

We have reviewed your submission and based on the information you provided, we are granting your fee waiver request. The US Environmental Protection Agency (EPA) Office of Congressional and Intergovernmental Relations, within the Office of the Administrator, will be responding to your information request for the Agency.

If you have any questions concerning this determination, please contact me at (202) 566-1667.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry F. Gottesman", is written over a horizontal line.

Larry F. Gottesman
National FOIA Officer